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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 498

GALBAN LOBO CO., S. A., PETITIONER

v.

LEON HENDERSON, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 71-76) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered September 30, 1942 (R. 77). The petition for a writ of certiorari was filed October 28, 1942. Jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act").

QUESTION PRESENTED

Whether a price schedule issued by the Administrator acting under Executive Order, as applied to purchases and sales completed prior to the effective date of the Emergency Price Control Act, is subject to the procedure for protest and judicial review provided in the Act.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (Pub. L. 421, 729, 77th Cong., 2d Sess.), appear in the Appendix.

STATEMENT

On August 13, 1941, the Administrator of the Office of Price Administration and Civilian Supply,¹ acting under the authority of Executive Order No. 8734 (6 Fed. Reg. 1917), issued Price Schedule No. 16—Raw Cane Sugars (R. 45-48). This Schedule established 3.48 cents per pound, duty paid cost and freight basis, as the maximum price at Gulf ports for raw cane sugar produced in offshore areas. On October 27, 1941, petitioner entered into a contract with the Imperial Sugar Company for the sale to Imperial of certain Cuban raw sugar (R. 16-18). The contract contained a forward pricing provision authorizing the seller to call the price on any day on or before January 31, 1942, at the Cuban equivalent of the sell-

¹ By Executive Order No. 8875 (6 Fed. Reg. 4483), dated August 28, 1941, the name was changed to the Office of Price Administration.

ing price established by the Office of Price Administration on the date of call (R. 19). Delivery of this sugar to Imperial was completed on January 2, 1942 (R. 10).

On January 3, 1942, Amendment No. 2 to Price Schedule No. 16 was issued, effective January 5, increasing the maximum price for such sugar at Gulf ports from 3.48 cents per pound to 3.73 cents per pound (R. 53-54). On or about January 15, 1942, petitioner called the price on the basis of the Cuban equivalent of 3.73 cents per pound, that is, on the basis of the increased price established by Amendment No. 2 (R. 10). Thereafter, on January 26, 1942, Amendment No. 3 to Price Schedule No. 16 was issued, continuing the maximum price of 3.73 cents per pound established by Amendment No. 2 and, for the first time, authorizing forward pricing by permitting the payment of an adjusted price not to exceed the maximum price in effect at the time of arrival of the sugar at quarantine at the port of destination (R. 55-58). Subsequently, Imperial refused to pay the call price on the ground that it exceeded the maximum price permitted by Price Schedule No. 16 (R. 20-21).

On January 30, 1942, the Emergency Price Control Act of 1942 was enacted. Price Schedule No. 16, in its amended form, was thereafter duly reprinted in the Federal Register as Revised Price Schedule No. 16 (R. 59-67) and, pursuant to Sec-

tion 206, became effective under the Act on February 11, 1942, the date upon which the Price Administrator took office (R. 59).

On March 2, 1942, petitioner filed a protest with the Office of Price Administration objecting to the maximum price established by Price Schedule No. 16 for the sale to Imperial (R. 28-42). The Price Administrator dismissed the protest upon the grounds that it was based upon a transaction which had occurred prior to the effective date of the Act and that it requested relief solely with respect to Price Schedule No. 16 as effective prior to that date (R. 43).

Petitioner thereupon filed a complaint with the United States Emergency Court of Appeals seeking to set aside that order and to have the proceeding remanded for decision on the merits (R. 1-25). The court dismissed the complaint, holding that the protest and review provisions of the Act are not applicable to a transaction completed prior to the effective date of the Act and governed by a price schedule effective only by virtue of Executive Order (R. 71-76).

ARGUMENT

The only reason urged by petitioner for granting the petition for certiorari is that the court below decided an important question of the construction of the Emergency Price Control Act of 1942. In

point of fact, however, the question decided has no significance beyond the particular case.

Section 203 (a) of the Act requires all protests against price schedules to be filed within a period of sixty days after the effective date specified in Section 206, unless based upon grounds arising thereafter. The effective date of all revised price schedules, including Revised Price Schedule No. 16, was February 11, 1942, and the statutory period for protest lapsed on April 12, 1942. Only petitioner has filed a protest under the Act to the application of an Executive Order price schedule to a purchase and sale completed prior to the enactment of the Act. All other persons similarly situated are now barred. Only the petitioner, therefore, is affected by the decision.

Moreover, the decision of the Emergency Court of Appeals is manifestly correct. In view of the integrated character of the statutory provisions, petitioner can prevail only if the Act as a whole be given retroactive effect. No such retroactive effect was provided for or intended.

The criteria for action under the Executive Order were substantially different from those imposed by the Act. During the ten months prior to the passage of the Act, 105 price schedules were issued under authority of the Executive Order. To facilitate the transition from price control under Executive Order to price control under the Act, Congress provided, in Section 206, that these

price schedules should have the same effect from the date upon which the Administrator took office as if issued under Section 2 of the Act. Such price schedules were required to be consistent with the standards of Section 2 and the limitations of Section 3 of the Act and to be reprinted in the Federal Register. On February 17, 1942, the Administrator ordered that 100 of these schedules (including No. 16 as theretofore amended) be reprinted, and in his order stated that they had been reexamined and, where necessary, amended to bring them into conformity with Sections 2 and 3 of the Act (R. 50-60).²

Not only does Section 206 contain no indication that the provisions of the Act were to be given retroactive effect, but the contrary affirmatively appears. Section 206 explicitly provides that any price schedule issued prior to the date upon which the Administrator took office under the Act should "from such date" have the same effect as if issued under the Act. Thus both the governing criteria for schedules under the Act and the effectiveness of the schedules thereunder were brought into operation only prospectively.

The statutory pattern is consistent throughout, embracing procedure as well as substance. Section 206 of the Act provides that "such price schedules" shall be subject to protest and review. Clearly, by

² Five of the schedules were not made effective under the Act and hence were not reprinted in the Federal Register.

"such price schedules" is meant those effective under the Act. Section 204 (d) establishes the exclusive jurisdiction of the Emergency Court of Appeals and of this Court to determine the validity of any price schedule "effective in accordance with the provisions of section 206." Section 4 (a) makes unlawful and hence subject to the civil and criminal sanctions of Section 205, violations of "any price schedule effective in accordance with the provisions of section 206." The retroactive application of the criminal provisions could not have been intended yet the language used in these provisions is identical.

No provision of the Act confers the jurisdiction urged by petitioner to review price schedules as they existed prior to the effective date of the Act, nor is there any evidence in the legislative history that Congress intended to create such jurisdiction by inference. To the contrary, the Act expressly precludes an interpretation which would authorize the Administrator and the court to apply the statutory procedure here and thus to test price schedules issued under the Executive Order by criteria subsequently adopted by the Act. Such an application of the Act could not be inferred even if its language were less explicit. Cf. *United States v. St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1.

CONCLUSION

We submit that the decision below is correct, that the case presents no federal question of general importance, and that the petition should therefore be denied.

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